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No. 482.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
EDWIN M. KEATLEY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

PHILIP M. ASHFORD,
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STATEMENT OF THE CASE.

Edwin M. Keatley, the appellee, was clerk of the United States District and Circuit Courts for the Southern District of West Virginia during the period from January 1, 1901, to January 1, 1904. He regularly rendered accounts against the United States for services performed during said period as such clerk, which contained, among other things, charges for "separate docket fees in separate trials under one indictment." Said charges were disallowed by the accounting officers, and suit was brought therefor in the Court of Claims. (Item 6 of the petition, bottom of page 2, Record.)

The circumstances under which these services were performed are shown in the last paragraph of the third finding of fact. (Rec., p. 8.) Judgment was rendered for claimant on said item.

A counterclaim was filed in the Court of Claims, praying for the recovery of $57.90 charged for "docketing judgments" and alleged to have been erroneously and unlawfully paid to the claimant by the defendant's accounting officers. What purports to be a replication to said counterclaim was filed in the Court of Claims (Rec., pp. 4–6), but an examination thereof discloses the fact that the counterclaim is not referred to therein. The court made no finding with respect to the counterclaim, but it is stated in the opinion that the services charged for, "docketing judgments," were admittedly performed by order of the court (Rec., p. 9).

This fact is not disputed, and appellant is willing that it may be treated as if stated in the findings of fact.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

(1) In rendering judgment against the appellant for the charges included in item 6, finding 3. (Rec., p. 8.)

(2) In overruling appellant's counterclaim. (Rec., p. 3.)

ARGUMENT.

The services charged for under item 6 were performed in cases where an indictment was returned against two or more defendants and motion for sever-

ance on behalf of defendants was granted by the court allowing separate trial, and each defendant was separately designated on the criminal docket and entries made thereunder precisely as if such defendant had been separately indicted. The amount involved in this case is only $16. The legal questions involved, however, touch every clerk of a Federal court. The decision of this court will determine the payment or nonpayment of many thousands of dollars annually to them for such services as are claimed for in this item.

The clerk's fee bill, so called, provides:

> For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.
>
> For making dockets and indexes, taxing costs, and all other services in a cause where issue is joined but no testimony is given, two dollars.
>
> For making dockets and indexes, taxing costs, and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar. (Sec. 828, paragraphs 10, 11, and 12.)

As suggested in the opinion of the Court of Claims, the issue as to this item turns upon the signification to be attached to the word "cause" as it occurs in the paragraphs in the statute above quoted. It is the contention of the United States that the word "cause" as here used is limited to the "true bill" or indict-

ment returned by the grand jury. That is to say, if the indictment was returned against A, B, and C, the "cause" which the clerk of the court would docket under such indictment would be "*The United States* v. *A, B, and C,*" and the fee prescribed in the paragraphs of the statute above quoted would be payable to the clerk upon the *final* disposition of said "cause."

It was not within the province of the trial court to make more than one "cause" by granting separate trials to the individuals thus jointly indicted. It, of course, had the right to grant separate trials, and the doing so may have entailed upon the clerk some additional work in the way of making entries in his dockets, but there is no argument in this in favor of his claim for compensation for extra service.

This court has held, in the case of *United States* v. *McCandless* (147 U. S., 692), that a docket fee is not taxable until the case is finally disposed of. That was a case in which the jury disagreed or in which there was a mistrial for some reason, and the case was continued. It is pertinent here to inquire what other or greater hardship in the way of performing extra service was laid upon the clerk in the case at bar, where *separate* trials were granted, than in the case of McCandless, who was compelled to empanel a jury, tax the costs, and perform all other service a second time, and so on, until the case was "finally disposed of," before he was entitled to receive his docket fee.

It was not necessary that the clerk in this case should separately designate on the docket, under a separate docket number, the defendants jointly indicted and separately tried. The entries made under such caption were manifestly the same as if they had been entered under the original caption as designated in docketing the indictment. But if the clerk chose, for the purposes of his own convenience, to give each separate trial an individual docket number, he can not be criticised for so doing. It seems perfectly clear that such action on his part, even though he may have been specifically directed by the court so to do, which does not appear, would not operate to increase or multiply the fees of his office by thus arbitrarily separating a "cause" into causes.

If the clerk in the case at bar had a right to make an additional "case" or "cause" by separately designating each defendant separately tried and giving the trial proceedings a separate docket number, then there was no reason why Clerk McCandless could not have made a separate case or "cause" by redocketing and giving a new docket number to the case in his court when it came up for a new trial. The second trial of the case in Clerk McCandless's court was as much a "proceeding in court," as suggested in the opinion of the Court of Claims, as was the separate trial of the second defendant named in a joint indictment in the case at bar.

ASSIGNMENT OF ERROR, NO. 2.

Docketing judgments, it is contended, is a service which is covered by the docket fees prescribed in the

paragraphs of section 828 quoted above. Many definitions of the word "docket" are given in the law dictionaries, encyclopedias of law, and other standard works. They all agree that a docket is a book containing a brief summary or digest of the proceedings of the court with relation to specific matters. Thus we speak of the trial docket, the judgment docket, the execution docket, mechanics' lien docket, etc.

The findings of this court on the subject of this counterclaim are not as full and complete as they might be, but it is believed that it appears from the face of the counterclaim itself that the fees claimed for "docketing judgments" are detail fees such as folio fees for each entry made in said docket. At all events, it is perfectly apparent from the statement of the allowance of said fees (Rec., p. 3) that the charges were not those specified in paragraphs 10, 11, and 12 of section 828.

It will be observed that the language of that statute does not confine the fee prescribed to any one docket or kind of docket, but it is plural in number and unlimited as to kinds. Had Congress intended it to apply to but one book, as, for example, the appearance docket, or the execution docket, or the criminal docket, it would have so stated, or at least it would have used the singular—"making *the* docket." The fee thus provided is a case fee covering all the "services" of the character defined in *a* "cause," and not *in causes*, hence it can not be contended that the term is pluralized because of its application to two or more

causes. It was clearly made plural because of the various dockets which may be required in *one* cause. As was well said by the Circuit Court of Appeals for the Fifth Circuit, in a recent decision:

> These docket fees seem to provide for making dockets and taxing costs in every class of cases likely to arise in the courts of the United States. The fee bill does not specify the dockets to be kept, but seems to include all services in keeping dockets. (*United States* v. *Marsh*, 112 Fed. Rep., 929.)

It is therefore submitted that services performed by the clerk in "docketing judgments" can only be compensated by the docket fee of one, two, or three dollars, as the case may be. If this contention is correct, it follows that the payment made to appellee of the fees indicated in the counterclaim was erroneous and unlawful, and the United States has a right to recover the same.

The Court of Claims puts its disallowance of the counterclaim on the ground that the services were required to be performed by an order of the court, and cites in support of its conclusion the decision of this court in the case of *Jones*. (193 U.S., 528–530.) What the court said in that case was that, as between the clerk and the Government, an order of the court requiring a certain service to be performed was sufficient authority for the performance of the service and the allowance of the *proper fee* therefor. The question in the case at bar is what is the proper fee. There is no question at all but that Clerk

Keatley was required to keep a judgment docket and make the necessary entries therein, and if there is any fee in any statute prescribed for making entries in a judgment docket, or for "docketing judgments," he is certainly entitled to be compensated in accordance therewith. But we have failed to find any such fee, except so far as paragraphs 10, 11, and 12 of section 828 prescribe such compensation.

It will no doubt be contended by counsel for appellee that such a fee is prescribed by paragraph 8 of said section. If it is, it must come under the provision "for entering any * * * judgment * * * or making any record." As has been before pointed out, a judgment docket is not a record in the sense that it contains an entry of the judgment *in extenso*. Entering a brief note of the fact that a judgment had been entered such as would naturally be made in a judgment docket would not be "entering" a judgment, nor would it be making a record of the judgment.

It is therefore respectfully submitted that the Court of Claims erred: (1) In allowing docket fees where there was a separate trial for defendants jointly indicted; (2) In overruling the counterclaim filed by the appellant.

J. A. VAN ORSDEL,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Assistant Attorney.

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